DEPARTMENT OF STATE REVENUE

04-20120449.LOF

Letter of Findings Number: 04-20120449
Sales Tax
For Tax Years 2008-11

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ISSUE

I. Sales Tax–Imposition.

Authority: Quill Corp. v. North Dakota, 504 U.S. 298 (1992); IC § 6-2.5-2-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1.

Taxpayer protests the imposition of sales tax.

STATEMENT OF FACTS

Taxpayer is an out-of-state business which made deliveries of its merchandise to its customers in Indiana. As the result of an audit covering the tax years 2008, 2009, 2010, and 2011, the Indiana Department of Revenue ("Department") determined that Taxpayer had not reported the correct amount of sales tax for those years. The Department therefore issued proposed assessments for sales tax and interest. Taxpayer filed a protest of those proposed assessments. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax–Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax for the tax years 2008-11. Taxpayer believes that its delivery of merchandise did not constitute taxable events in Indiana. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as required by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

(Emphasis added).

Also, IC § 6-2.5-9-3 provides:

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state. If the individual knowingly fails to collect or remit those taxes to the state, he commits a Class D felony.

(Emphasis added).

Since the nine items in question were transferred from Taxpayer to Taxpayer's customers in Indiana, Taxpayer was the retail merchant in Indiana transactions and should have collected the tax as agent for the state. Therefore, the Department determined that Taxpayer had not collected and remitted the proper amount of sales tax for these years.

At hearing, Taxpayer protested that it only delivered the items to its customers in Indiana when the customer's location was on the route to an event which Taxpayer was attending anyway. Taxpayer also states that its customers must have paid tax when they licensed the vehicles in question in Indiana. Taxpayer believes that its activities do not establish nexus with Indiana for sales tax collection purposes.

A United States Supreme Court case dealing with this issue is Quill Corp. v. North Dakota, 504 U.S. 298 (1992), in which the Court explains:

While contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, Bellas Hess is not inconsistent with Complete Auto and our recent cases. Under Complete Auto's four-part test, we will sustain a tax against a Commerce Clause challenge so long as the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S., at 279, 97 S.Ct., at 1079. Bellas Hess concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause.

Id. at 311.

The Court also provided:

> Complete Auto, it is true, renounced Freeman and its progeny as "formalistic." But not all formalism is alike. Spector's formal distinction between taxes on the "privilege of doing business" and all other taxes served no purpose within our Commerce Clause jurisprudence, but stood "only as a trap for the unwary draftsman." Complete Auto, 430 U.S., at 279, 97 S.Ct. at 1079. In contrast, the bright-line rule of Bellas Hess furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. Bellas Hess followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under Bellas Hess, such vendors are free from state-imposed duties to collect sales and use taxes.
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> Id. at 314-5.

Again, the tax here is being applied to an activity with more than substantial nexus with Indiana. Taxpayer is a retail merchant by trade and specifically agreed to deliver the merchandise to its customers in Indiana in its own conveyance. As described above in Quill, such a vendor is not free from state-imposed duties to collect sales taxes.

After review of the supplied documentation, the Department is not convinced that this documentation establishes Taxpayer's argument. Of the nine vehicles in question, Taxpayer was only able to supply brief notes from three of the customers which stated that tax was paid on the vehicles. Of those three statements, the Department notes that the statements merely say that tax was paid. The statements are not receipts from the Indiana BMV which would establish that tax was paid. One logical alternative to the customers registering the vehicles with the Indiana BMV would be if the customer bought the item and sold off parts. In that case, registration with and collection of tax by the BMV would not be necessary, even though the customer acquired the item in a retail transaction. This documentation does not prove the proposed assessments wrong and therefore Taxpayer has not proven the proposed assessments wrong as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is denied.

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